92-1216

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN J. HESS,
Petitioner,

v.

PENNSYLVANIA STATE SYSTEM
OF HIGHER EDUCATION,
Respondent.

Petition For a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Richard J. Orloski
Counsel for Petitioner
ORLOSKI & HINGA
1005 South Cedar Crest Boulevard
Allentown, PA 18105
(215) 433-2363

QUESTION PRESENTED FOR REVIEW

1) Whether or not the Court of Appeals for the Third Circuit erred as a matter of law in affirming the grant of respondent's motion for judgment under F.R.C.P. 50(a) where (1) the trial court held that a male who files suit under the Equal Pay Act, 29 U.S.C. §621-638 has a higher burden of proof than a female to establish a prima facie case; and, 2) assuming arguendo that petitioner has a greater burden of proof, petitioner met the higher standard where the uncontradicted evidence was that the respondent promoted a female on June 20, 1989 which would have paid her with no seniority as a Police Officer II at $920.40 while petitioner was receiving $973.00 for ten years seniority, but the respondent unilaterally amends the promotion -- precluded petitioner from applying for the new position -- and the then gives the female the promotion at a higher rate ($1,047.00) than it was paying this senior male petitioner?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ii

TABLE OF CITATIONS iv

OPINIONS BELOW 2

JURISDICTION 2

FEDERAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT 11

ARGUMENT 12

CONCLUSION 24

MEMORANDUM OPINION OF THE COURT . . . 1a

ORDER 12a

TABLE OF CITATIONS

Corning Glass Works v. Brennan,
417 U.S. 188, 95 (1974) 15-17

Maxwell v. City of Tucson,
803 F.2d 444, 446 (9th Cir, 1986) 16

Patkus v. Sangamon-Cass Consortium,
769 F.2d 1251 1260 n. 5 (7th Cir, 1985) 16

Plemer v. Parsons-Gilbane,
713 F.2d 1127, 1138 (5th Cir, 1983) 16

Strecker v. Grand Forks County Social Serv. Bd.,
640 F.2d 96, 99 (8th Cir, 1980) (en banc) . . . 16

No. _____

In The
Supreme Court of the United States

JOHN J. HESS,

Petitioner,

v.

PENNSYLVANIA STATE SYSTEM
OF HIGHER EDUCATION,

Respondent.

**Petition For a Writ of Certiorari to
the United States Court
of Appeals for the Third Circuit**

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, John J. Hess, prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered October 21, 1992 is unrecorded and appears at page of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered March 19, 1992 is unrecorded and appears at page of the Appendix herein.

The final Order of the Court of Appeals for the Third Circuit was dated October 21, 1992 and this Petition for Write of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Courts rests upon 28 U.S.C. §1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

29 U.S.C. §621 - §638 at Appendix page 13.

STATEMENT OF THE CASE

Petitioner filed this action seeking damages arising from Respondent's alleged failure to pay Petitioner higher wages than Respondent paid persons of the opposite sex based upon Petitioner's gender even though Petitioner performed same duties and responsibilities and Petitioner had ten (10) more years seniority.

The case proceeded to trial on March 16, 1992. After Petitioner's evidence, Respondent moved for judgment pursuant to F.R.C.P. 50(a). The trial Court granted Respondent's motion. The Third Circuit Court of Appeals upheld the District Court. Petitioner now respectfully seeks review by this Honorable Court.

STATEMENT OF FACTS

In explaining the dismissal to the jury, the trial judge reiterated that this male Petitioner must be held to a high burden than a female as follows:

> "Or to put it another way, the person with gender discrimination why didn't the person get the job? Well, the job went to somebody with the other gender. If a person complaining is a woman, the initial burden, what that person

> has to show is not as great as if the plaintiff who's complaining is a male."
>
> (Appendix, Vol III, p. 283a)[1]
>
> ". . .But it is my conclusion--and this is why I have dismissed this case--it is my conclusion that when a male is the complainant, as is the case with Officer Hess, he has to establish more to get to the point of requiring the defense to come and explain what it's doing. He has to establish more than simply that there were two people of different genders doing the same job, and one got more money than the other."
>
> (Appendix, Vol. III, p. 285a)

The Trial Court clearly imposed a higher burden of proof upon male Petitioner. This imposition was unwarranted and unfair to Petitioner.

Respondent's Motion for judgment under Rule 50(a) is not supportable under the facts of this case. As

---

[1]All references to Appendix are to Appendix submitted to Third Circuit Court of Appeals.

Respondent's attorney argued in support of Respondent's motion, Petitioner must show Respondent paid persons of the opposite sex more money than Petitioner for the same job. (Appendix, Vol. III, p. 249a-251a). Petitioner agrees with Respondent regarding the aforesaid elements of the prima facie case.

At the abbreviated trial, Respondent argued that Respondent proved an affirmative defense for Respondent's discriminatory treatment of Petitioner (Appendix, Vol. III, p. 251a, 252a). Respondent thus implicitly acknowledged that Petitioner proved a prima facie case.

On June 20, 1989, Respondent promoted a female officer with no seniority as a P. O. II to P. O. II at $920.40 biweekly. In June 1989, Ms. Cindy Bogart was earning $867.20 biweekly as a

P. O. I. (Appendix, Vol. III, p. 194a).

On June 20, 1989, Respondent wrote Cindy Bogart promoting her to P. O. II and informing her that her salary would be about $902.40 biweekly. (Appendix, Vol. III, p. 188a, 189a, 195a, and Vol. II, p. 176a). Ms. Bogart's promotion was effective June 17, 1989. (Appendix, Vol. III, p. 189a). Ms. Bogart accepted said promotion as of June 17, 1989. (Appendix, Vol. III, p. 195a). Ms. Bogart never rejected nor complained of the promotion or accompanying

salary.

Respondent Chief of Police ordered Ms. Bogart's promotion date to be changed. Although Ms. Bogart became a P. O. II of June 17, 1989, Respondent changed the effective date to give this female employee an advantage of a higher salary. (Appendix, Vol. III, p. 191a).

At the time Respondent gave Cindy Bogart the job she had approximately nine years experience as a P. O. I. (Appendix, Vol. III, p. 188a). At that time, Petitioner had 10 years experience as a P. O. II, plus an additional six years experience as a P. O. I. Petitioner had begun with Respondent in 1974. (Appendix, Vol. III, p. 215a). In 1980, Petitioner earned a promotion to P. O. II. (Appendix, Vol. III, p. 216a). Respondent failed to provide senior Petitioner with the opportunity to apply for the new higher paid P. O. II position.

At the time of the female's June 20, 1989 promotion, Petitioner was earning $973.00 biweekly for ten years seniority. (Appendix, Vol. III, p. 196a). At the time of her promotion, Ms. Bogart was due to make $902.40 compared to Petitioner's $973.00. (Appendix, Vol. III, p. 196a). A differential would have existed in favor of Petitioner based upon Petitioner's much greater seniority.

Respondent rescinded Ms. Bogart's promotion and

reinstated the promotion on a later date for the purpose of giving Ms. Bogart a salary increase to $1,047.00. (Appendix, Vol. III, p. 197a). Respondent changed Ms. Bogart's promotion date to give this female employee a salary increase, which advantage Respondent did not provide to Petitioner or any other employee. (Appendix, Vol. III, p. 198a).

After the female's promotion to P. O. II at a pay rate less than senior male Petitioner's rate, Respondent unilaterally amended the promotion to provide the female with a higher pay rate than senior male Respondent. Respondent changed female P. O. II's promotion date. Respondent did not provide this benefit to any other employee. (Appendix, Vol. III, p. 199a).

Respondent was specifically aware of the fact that Respondent benefit for Ms. Bogart, the least senior P. O. II would increase her salary to higher than Petitioners, a senior top rank P. O. II.

Respondent knowingly and intentionally solely provided Ms. Bogart with the benefit, knowingly and intentionally making her the least senior P. O. II at the highest salary. (Appendix, Vol. III, p. 201a). On June 26, 1989, Respondent wrote Ms. Bogart another letter, (Appendix, Vol. II, p. 177a), indicating that Ms. Bogart's

new salary would be $1,047.20. (Appendix, Vol. III, p. 194a). At that time, Respondent was paying Petitioner only $973.60. (Appendix, Vol. III, p. 196a). Petitioner's salary was based upon the fact that Petitioner was at the top step of the P. O. II range. Petitioner reached the top range due to a longevity increase based upon Petitioner's many years of service.

Respondent precluded Petitioner from applying for the new position and gave the female the promotion at a higher rate that Respondent pays senior male Petitioner. In April 1989, Respondent had an opening for P. O. II. (Appendix, Vol. III, p. 186a). Respondent was required to fill the job on the basis of seniority of the candidates. Respondent was required to fill the job on the basis of seniority of the candidates. Respondent never notified Petitioner of anyone else that this P. O. II position would be a higher paying position than existing P. O. II positions. In essence, Respondent created a new higher paid P. O. II position.

Respondent knew Respondent's new position was going to be paid at the higher rate. At the point, Respondent had an obligation to open that new higher rate position to all P. O. II's. Given fair consideration, Petitioner, being most senior, would have earned the new position. However, Respondent refused to use this standard measure, (Appendix,

Vol. III, p. 186a), and gave a female the advantage it refused to male Petitioner.

Regardless of whether or not Respondent had changed Ms. Bogart's effective date of promotion, Ms. Bogart would have received a salary increase on July 1, 1989 the same as all other of Respondent's P. O. II's. (Appendix, Vol. III, p. 208a, 209a). Based upon the normal course of these pay increases, Respondent admitted at trial that Ms. Bogart would earn less than this more senior Petitioner. (Appendix, Vol, III, p. 211a). Such treatment would have been fair and equitable. However, Respondent deliberately chose to provide its least senior female P. O. I with a benefit Respondent did not provide to Appellant.

Petitioner requested, in writing, that Respondent make Petitioner's pay equal to Petitioner's less senior counterpart. (Appendix, Vol. III, p. 213a). Respondent refused. Additionally, the uncontradicted evidence indicates that Respondent's Chief of Police who orchestrated the female's additional salary benefit not provided to Petitioner, had a history of favoring female police officers. (Appendix, Vol. III, p. 236a). Hence, to the extent the trial court required Petitioner to prove a tilted work environment, Petitioner's such evidence was uncontradicted.

On appeal, the Third Circuit concluded Petitioner failed to present evidence to show Respondent's proffered reason is pretextual. (Third Circuit Order and Opinion, p. 8). In fact, the trial court directed a verdict before Respondent offered evidence of pretext. Thus, Petitioner never had an opportunity to discredit Respondents defense. Petitioner respectfully seeks review by this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

1) WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN AFFIRMING THE GRANT OF RESPONDENT'S MOTION FOR JUDGMENT UNDER F.R.C.P. 50(A) WHERE (1) THE TRIAL COURT HELD THAT A MALE WHO FILES SUIT UNDER THE EQUAL PAY ACT, 29 U.S.C. §621-638 HAS A HIGHER BURDEN OF PROOF THAN A FEMALE TO ESTABLISH A PRIMA FACIE CASE; AND, 2) ASSUMING ARGUENDO THAT PETITIONER HAS A GREATER BURDEN OF PROOF, PETITIONER MET THE HIGHER STANDARD WHERE THE UNCONTRADICTED EVIDENCE WAS THAT THE RESPONDENT PROMOTED A FEMALE ON JUNE 20, 1989 WHICH WOULD HAVE PAID HER WITH NO SENIORITY AS A POLICE OFFICER II AT $920.40 WHILE PETITIONER WAS RECEIVING $973.00 FOR TEN YEARS SENIORITY, BUT THE RESPONDENT UNILATERALLY AMENDS THE PROMOTION -- PRECLUDED PETITIONER FROM APPLYING FOR THE NEW POSITION -- AND THE THEN GIVES THE FEMALE THE PROMOTION AT A HIGHER RATE ($1,047.00) THAN IT WAS PAYING THIS SENIOR MALE PETITIONER?

1. The trial court erred as a matter of law in granting Respondent's Motion for judgment based upon the Court's holding that male Respondent has a higher burden of proof than a female to establish a prima facie case under the Equal Pay act, 29 U.S.C. §621-638.

a. The trial court placed a higher burden of proof upon Petitioner. (Appendix, Vol. III, p. 257a, 258a, 262a, 263a). The trial court imposed upon Petitioner the burden to prove Respondent's direct intent to discriminate as part of Petitioner's prima facie case, Id. (Appendix, Vol III, p. 272a), or a "tilted" work environment Id. Respondent's direct intent to discriminate is not, and should not be, an essential element of Petitioner's prima facie case.

In explaining the dismissal to the jury, the trial judge reiterated that this male Petitioner must be held to a higher burden than a female as follows:

> "Or to put it another way, the person with gender discrimination why didn't the person get the job? Well, the job went to somebody with the other gender. If a person complaining is a woman, the initial burden, what that person has to show is not as great as if the plaintiff who's complaining is a male."
>
> (Appendix, Vol III, p. 283a)

> ". . .But it is my conclusion--and this is why I have dismissed this case--it is my conclusion
> that when a male is the

> complainant, as is the case with Officer Hess, he has to establish more to get to the point of requiring the defense to come and explain what it's doing.
> He has to establish more than simply that there were two people of different genders doing the same job, and one got more money than the other."

(Appendix, Vol. III, p. 285a)

The trial Court clearly imposed a higher burden of proof upon male Petitioner. This imposition was unwarranted and unfair to Petitioner.

b. The trial judge erroneously relied upon reverse discrimination cases under Title VII in granting Respondent's motion. (Appendix, Vol. III, p. 262a-266a).

The Equal Pay Act cases do not involve Title VII McDonnell Douglas analysis. Instead, separate and distinct analysis is used in Equal Pay Act cases. The proper legal analysis of Equal Pay Act cases is set forth below.

Respondent's motion for judgment under Rule 50(a) is not supportable under the facts of this case. As Respondent's attorney argued in support of Respondent's motion, Petitioner must show Respondent paid persons of the

opposite sex more money that Petitioner for the same job. (Appendix, Vol. III, p. 249a-251a).

Petitioner agrees with Respondent regarding the aforesaid elements of the prima facie case.

c. The trial court erred as a matter of law in requiring Petitioner to prove intent to discriminate as part of Petitioner's prima facie case. The Petitioner in an Equal Pay Act case has the initial burden of proving a violation by demonstrating that:

1. an employer;
2. pays or paid different wages;
3. to an employee of the opposite sex;
4. in an establishment, when they were doing;
5. equal work on jobs, the performance of which;
6. requires equal skill, effort and responsibility;
7. and under similar working conditions.

29 U.S.C. §206(d)(1); Corning Glass Works v. Brennan, 417 U.S. 188, 95 (1974).

Accordingly, Petitioner need not prove intent to

discriminate. See, e.g., Maxwell v. City of Tucson, 803 F.2d 444, 446 (9th Cir, 1986); Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251 1260 n. 5 (7th Cir, 1985); Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 99 (8th Cir, 1980) (en banc).

No dispute exists that this case involves same work jobs and responsibility. (Appendix, Vol. III, p. 246a). In fact, no dispute exists concerning any element of Petitioner's prima facie case. The uncontradicted evidence at trial demonstrates Petitioner proved all above elements of a prima facie case. The trial court did not dispute this. Instead, the trial judge erroneously imposed an additional burden upon Petitioner. Hence, the trial court erred as a matter of law in granting Respondent's motion for judgment.

d. The trial court erred as a matter of law in requiring Petitioner to disprove Respondent's affirmative defense as part of Petitioner's prima facie case. Once Petitioner has established a prima facie case, the burden shifts to Respondent to show that the difference in wages resulted from a legitimate factor and was not based upon sex. Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974). This burden upon Petitioner is an affirmative defense. See, e.g., Maxwell v. City of Tucson, 803 F.2d 444, 446 (9th Cir, 1986); Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1138

(5th Cir, 1983).

The trial court erroneously placed Respondent's above burden of proof of an affirmative defense upon Petitioner. The trial court merged Respondent's burden to show a nondiscriminatory reason for its action with Petitioner's prima facie case. The trial court required Petitioner to prove intent as part of the prima facie case. The trial court's additional requirement upon Petitioner is erroneous as a matter of law.

Generally, Petitioner may rebut Respondent/Employer's affirmative defense with evidence that the asserted defense is merely a pretext for discrimination. Corning Glass Works v. Brennan, supra and its progeny. The trial court never provided Petitioner with an opportunity to rebut Petitioner's affirmative defense. Instead, the trial court required Petitioner to disprove Petitioner's affirmative defense with Petitioner's prima facie case.

At the abbreviated trial, Respondent's discriminatory treatment of Petitioner (Appendix, Vol. III, p. 251a, 252a). Respondent thus implicitly acknowledged that Petitioner proved a prima facie case.

2. Even assuming arguendo that Petitioner has a

greater burden of proof, Petitioner met the higher standard. This male plaintiff has the same burden of proof under the Equal Pay Act as a female plaintiff would have. For the reasons set forth above, the trial court erred in imposing a higher standard upon Petitioner. However, even assuming arguendo, that this male plaintiff has a greater burden of proof, Petitioner met that burden with uncontradicted evidence. Hence, the Respondent's Rule 50(a) motion for judgment ought to have been denied.

a. On June 20, 1989, Respondent promoted a female officer with no seniority as a P. O. II to P. O. II at $920.40 biweekly. In June 1989, Ms. Cindy Bogart was earning $867.20 biweekly as a P. O. I. (Appendix, Vol. III, p. 194a).

On June 20, 1989, Respondent wrote Cindy Bogart promoting her to P. O. II and informing her that her salary would be about $902.40 biweekly. (Appendix, Vol. III, p. 188a, 189a, 195a, and Vol. II, p. 176a). Ms. Bogart's promotion was effective June 17, 1989. Id. (Appendix, Vol. III, p. 189a). Ms. Bogart accepted said promotion as of June 17, 1989. (Appendix, Vol. III, p. 195a). Ms. Bogart never rejected nor complained of the promotion or accompanying salary. Id.

Respondent Chief of Police ordered Ms. Bogart's

promotion date to be changed. Although Ms. Bogart became a P. O. II on June 17, 1989, Respondent changed the effective date to give this female employee an advantage of a higher salary. (Appendix, Vol. III, p. 191a).

At the time Respondent gave Cindy Bogart the job she had approximately nine years experience as a P. O. I. (Appendix, Vol. III, p. 188a). At that time, Petitioner had 10 years experience as a P. O. I. Id. Petitioner had begun with Respondent in 1974. (Appendix, Vol. III, p. 215a). In 1980, Petitioner earned a promotion to P. O. II. (Appendix, Vol. III, p. 216a). Respondent failed to provide senior Petitioner with the opportunity to apply for the new higher paid P. O. II position.

b. At the time of the female's June 20, 1989 promotion, Petitioner was earning $973.00 biweekly for ten years seniority. (Appendix, Vol. III, p. 196a). At the time of her promotion, Ms. Bogart was due to make $902.40 compared to Petitioner's $973.00. (Appendix, Vol. III, p. 196a). A differential would have existed in favor of Petitioner based upon Petitioner's much greater seniority.

Respondent rescinded Ms. Bogart's promotion and reinstated the promotion on a later date for the purpose of giving Ms. Bogart a salary increase to $1,047.00. (Appendix, Vol. III, p. 197a). Respondent changed Ms.

Bogart's promotion date to give this female employee a salary increase, which advantage Respondent did not provide to Petitioner or any other employee. Id. (Appendix, Vol. III, p. 198a).

c. After the female's promotion to P. O. II at a pay rate less than senior male Petitioner's rate, Respondent unilaterally amended the promotion to provide the female with a higher pay rate than senior male Petitioner. Respondent changed female P. O. II's promotion date. Respondent did not provide this benefit to any other employee. (Appendix, Vol. III, p. 199a).

Respondent was specifically aware of the fact that Respondent's benefit for Ms. Bogart, the least senior P. O. II would increase her salary to higher than Petitioner's, a senior top rank P. O. II. Id.

Respondent knowingly and intentionally solely provided Ms. Bogart with the benefit, knowingly and intentionally making her the least senior P. O. II at the highest salary. (Appendix, Vol. III, p. 201a). On June 26, 1989, Respondent wrote Ms. Bogart another letter, (Appendix, Vol. II, p. 177a). indicating that Ms. Bogart's new salary would be $1,047.20. Id. (Appendix, Vol. III, p. 194a). At that time, Respondent was paying Petitioner only $973.60. (Appendix, Vol. III, p. 196a). Petitioner's salary

was based upon the fact that Petitioner was at the tip step of the P. O. II range. Id. Petitioner reached the top range due to a longevity increase based upon Petitioner's many years of service. Id.

d. Respondent precluded Petitioner from applying for the new position and gave the female the promotion at a higher rate than Respondent pays senior male Petitioner. In April 1989, Respondent had an opening for P. O. II. (Appendix, Vol. III, p. 186a). Respondent was required to fill the job on the basis of seniority of the candidates. Id. Respondent never notified Petitioner or anyone else that this P. O. II position would be a higher paying position than existing P. O. II positions. Id. In essence, Respondent created a new higher paid P. O. II position.

Respondent knew Respondent's new position was going to be paid at the higher rate. At that point, Respondent had an obligation to open that new higher rate position to all P. O. II's. Given fair consideration, Petitioner, being most senior, would have earned the new position. However, Respondent refused to use this standard measure, (Appendix, Vol. III, p. 186a), and gave a female the advantage it refused to male Petitioner.

Regardless of whether or not Respondent had changed

Ms. Bogart's effective date of promotion, Ms. Bogart would have received a salary increase on July 1, 1989 the same as all other of Respondent's P. O. II's. (Appendix, Vol. III, p. 208a, 209a). Based upon the normal course of these pay increases, Respondent admitted at trial that Ms. Bogart would earn less than this more senior Petitioner. Id. (Appendix, Vol. III, p. 211a). Such treatment would have been fair and equitable. However, Respondent deliberately chose to provide its least senior female P. O. I with a benefit Respondent did not provide to Petitioner.

Petitioner requested, in writing, that Respondent make Petitioner's pay equal to Petitioner's less senior counterpart. (Appendix, Vol. III, p. 213a). Respondent refused. Id. Additionally, the uncontradicted evidence indicates the Respondent's Chief of Police who orchestrated the female's additional salary benefit not provided to Petitioner, had a history of favoring female police officers. (Appendix, Vol. III, p. 236a). Hence, to the extent the trial court required Petitioner to prove a tilted work environment. Petitioner's such evidence was uncontradicted. Hence, Respondent's motion for judgment ought to have been denied.

3. The Appellate Court's reasoning is not supported by the facts of this case.

The Third Circuit's opinion is misleading in that it

finds:

> "Hess offered no evidence sufficient to combat the defendant's proffered reason for the promotion delay and thus failed to prove pretext for unlawful gender discrimination against males."

(Third Circuit Opinion dated October 21, 1992, page 8)

In actual fact, Petitioner never had an opportunity to prove pretext. Instead, the trial court held Petitioner to a higher burden of proof as set forth above. The trial court directed a verdict against Petitioner claiming Petitioner failed to prove a prima facie case under the heightened standard.

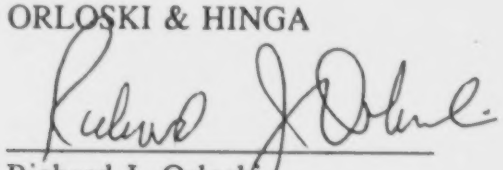
Had the trial court allowed Petitioner, Petitioner would have produced evidence that Respondent's proffered reason for the promotion delay was pretextual. However, the trial court denied Petitioner the opportunity to impeach Respondent's witnesses by holding Petitioner to a higher, improper burden of proof of Petitioner's prima facie case. Hence Petitioner respectfully seeks review by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Petition For a Writ of Certiorari ought to be granted.

Respectfully submitted,

ORLOSKI & HINGA



Richard J. Orloski
Attorney for Petitioner
Attorney ID. #09857
1005 S. Cedar Crest Blvd.
Allentown, PA 18103
(215) 433-2363

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1217

JOHN J. HESS, Appellant

vs.

PENNSYLVANIA STATE SYSTEM OF
HIGHER EDUCATION

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 90-04128)
District Judge: Honorable Louis H. Pollak

Argued September 21, 1992
Before: MANSMANN, ROTH and RESTANI,[1]
Circuit Judges.

(Filed October 21, 1992)

MEMORANDUM OPINION OF THE COURT

---

[1]Honorable Jane A. Restani of the United States District Court of International Trade, sitting by designation.

MANSMANN, Circuit Judge

In this civil action for alleged reverse gender discrimination brought pursuant to the Equal Pay Act, 29 U.S.C. § 206(d), Police Officer John Hess alleged that a female police officer was promoted in salary over him by defendant State System of Higher Education solely because of her gender.

At the jury trial the district court, in the absence of Third Circuit precedent regarding the prima facie Equal Pay Act case where the plaintiff is male, and in the absence of explicit statutory allocation of the burdens of proof, initially adopted a standard of proof set out in a line of Title Vii reverse discrimination cases. Under that standard, a male plaintiff assumes the heightened burden of proving a prima facie case of either actual discrimination or a general background of discrimination against males in the work environment. Thus, under Title VII, some courts will not afford a plaintiff, who is not a member of a class suffering under an historical pattern of prejudice, a rebuttable presumption of unlawful discrimination.

Here the district court found that Hess did not make out the more difficult prima facie case requiring proof of actual discrimination or a tilted work environment. Secondly, the court found that Hess did not defeat the

defendant's rebuttal even under the standard Equal Pay Act prima facie case. Thus, the district court granted a directed verdict in favor of the defendant State System of Higher Education.

The district court assumed jurisdiction under 28 U.S.C. §§ 1331, 1337. We are asked to review the judgment of the district court pursuant to 28 U.S.C. § 1291. We need not reach the difficult question of whether proof of actual discrimination or a background of discrimination constitutes an element of a male plaintiff's prima facie case under the Equal Pay Act. We find that the plaintiff failed to meet his burden of proof even assuming the benefit of a rebuttable presumption. We will thus affirm the order of the district court.

I.

John Hess, a male Police Officer II at East Stroudsburg University, along with other police officers at East Stroudsburg University, was a member of the bargaining unit covered by a 1988-1991 collective bargaining agreement which established one type of pay scale effective until July 1, 1989. The agreement provided for greater increases upon promotions occurring on or after July 1, 1989, but did not extend that incentive upon promotion to officers who had been promoted prior to that date.

This agreement created the potential practical effect that an officer promoted after July 1, 1989, the effective date of the new pay scale, would receive a wage increase which resulted in a significantly higher salary than that of an officer with considerably more seniority, who had been promoted at an earlier date. This occurred here when Police Officer Cindy Bogart was promoted to Police Officer II after approximately nine years' experience as a Police Officer I. At the time of Bogart's promotion, Hess had 10 years' experience as a Police Officer II, plus an additional six years' experience as a Police Officer I. The promotion of Bogart, a female officer, resulted in a wage increase which placed her salary at a higher rate than Hess', a male officer with seniority.

Bogart was the only bidding officer, male or female, who was poised under the terms of the collective bargaining agreement to be promoted to Police Officer II because of her seniority as Police Officer I. Under the agreement, Hess, who was already a Police Officer II, was not provided an opportunity to bid for the position. The agreement barred a person already in the title from bidding for a vacant position within the same title, (R. 74a), precluding Hess, a Police Officer II, from bidding for another Police Officer II vacancy. Hess asserts that the higher paid Police Officer II

position created by the agreement was in essence a new category of police officer by virtue of the higher pay scale, albeit there was no difference in the description of duties. He therefore claims that he should have been permitted, even under the agreement, to bid for the new Police Officer II position. In the alternative, Hess had requested that his salary, and those of similarly situated police officer, be raised to that of Bogart, but was again refused.

Hess claims that the Pennsylvania State System of Higher Education manipulated the collective bargaining agreement to give Bogart an enhanced opportunity for advancement because she is a woman. This allegation arises in large part from the fact that Bogart's promotion was originally scheduled to take effect on June 17, 1989, but was delayed for two weeks to give Bogart the benefit of the new pay scale with its greater promotion incentive.

On cross-examination Hess testified that he had actual knowledge only of the fact that the promotion was delayed "to try to get more money" for Bogart. (R. 232a). He could not aver that "the idea of holding off a couple weeks was based on whether the Chief liked or disliked any particular person," (R. 233a), or whether the promotee was a woman. (R. 232a). On redirect, Hess testified, in general terms, to the effect that the Chief of Police, upon whose

recommendation Bogart was promoted, had a history of favoring female police officer, but supported this allegation only with the statement, "(he always favored females. He was always nicer to them and stuff." (R. at 236a).

The Director of Human Resources at East Stroudsburg University testified that, at the time he authorized the delay, he was aware that the new promotion rules would generally result in people being promoted to higher salary levels than others with more seniority, and that he exercised his discretionary authority when he rescheduled Bogart's effective promotion date to avoid any potential employee discontent over monetary loss from a promotion occurring just days before the effective date of the new pay scale.

Before Bogart's position became available, the Deputy Secretary for Employee Relations for the Commonwealth of Pennsylvania circulated a memorandum to all personnel officers detailing a policy which was designed to "eliminate the disparity between promotions occurring during fiscal year 1988-89 and those which [would] occur on or after July 2, 1989. Any employee promoted during the year beginning July 1, 1989 [would] have a salary adjustment made on July 1, 1989 which [would] give the employee the salary that would have been earned had the promotion occurred on July

1, 1989.[1] (R. at 167a). Thus, under this retroactive policy, the delay in Bogart's promotion did not ultimately change the differential between her salary and Hess' salary, although at the time the decision to delay was made, it appeared as though a promotion prior to July 1, 1989 would technically bar application of the new pay scale. Subsequent to Bogart's promotion to Police Officer II, a male police officer with the second-most seniority as Police Officer I was promoted under the same provisions, and began earning the same salary as Bogart.

Hess appeals to have the directed verdict granted by the district court reversed. A directed verdict is appropriate only when the evidence, viewed in a light most favorable to the opposing party, is insufficient for a reasonable jury to find in the opposing party's favor. Denneny v. Siegel, 407 F.2d 433, 439 (3rd Cir. 1969).

II.

In the prototypical Equal Pay Act case, a female plaintiff attempts to establish that "an employer pays different

---

[1]We note that this memorandum was proffered but not admitted into evidence, although it is part of the Appendix and is discussed in the Brief for the State System of Higher Education. The district court did not rely on it in its decision.

wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions,'" Corning Glass Works v. Bennan, 417 U.S. 188, 195 (1974). We note that the Act establishes several exceptions within which an employer may characterize its pay scheme to rebut the plaintiff's prima facie showing. The Act recognizes, as legitimate, differential wages bused upon a bona fide job classification, a seniority system, or a merit system which does not discriminate on the basis of gender. The Act also provides a catchall exception for "a differential based on any other factor other than sex." Id. at 196. Once a plaintiff has demonstrated that the employer pays workers of one sex more than comparable workers of the opposite sex for the same job, the burden shifts to the employer to justify the differential under one of the Act's exceptions. Id. We have further held that upon proof of an affirmative defense, the plaintiff must be given the opportunity to show evidence of intent to discriminate to establish that the affirmative defense is merely pretext, although such a showing is not an element of the ordinary prima facie case. EEOC v. State of Delaware DHSS, 865 F.2d 1408, 1414 n.8 (3d Cir. 1989).

The statute, though promulgated to address the perceived societal prejudices which have handicapped women in employment, S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963), may be applied as well to protect men against reverse gender discrimination in employment. The statute requires, at a minimum, in all cases, that the plaintiff, male or female, show that a pay differential exists between employees of opposite gender. Assuming Hess had accomplished that much, since the employer proffered an exception to the Act, Hess must offer proof of actual discriminatory intent to show that the pay differential was predicated upon gender, or that the proffered exception is merely pretext.

The district court found that Hess failed to demonstrate actual discriminatory intent or a discriminatory pattern favoring women over men, the element necessary for his case under the possible heightened prima facie standard, or in order to defeat the State System of Higher Education's affirmative defense in the ordinary Equal Pay Act case sequence.

Hess offered no evidence sufficient to combat the defendant's proffered reason for the promotion delay, and thus failed to prove pretext for unlawful gender discrimination against males. The State System of Higher Education has established its affirmative defense by proving

that the pay differential resulted from a factor other than sex under the Act's exception. The promotion was made pursuant to a job and pay classification negotiated between the Commonwealth of Pennsylvania and the Union. The promotion delay was authorized in the discretion of the Director of Human Resources in the stated interest of employee morale. Hess' testimony that the Chief of Police has always been reputed to favor females is controverted by Hess' own testimony that overtime pay was based on seniority, not gender, (R. 238a), and that Bogart was the only bidding Police Officer I postured for the promotion. Under the collective bargaining agreement Hess was not eligible to apply for the Police Officer II position which Bogart filled. In addition, evidence that the agreement, though perhaps itself violative of the legitimate seniority system, was implemented irrespective of gender is the fact that the new pay scale gave Bogart and those promoted pursuant to it, male and female, greater salaries than both male and female officers in Hess' position.

In light of all the evidence viewed most favorably to the plaintiff, and all reasonable inferences capable of being drawn therefrom, we find that as a matter of law, a jury could not reasonably afford the relief plaintiff seeks. Though Hess' sense of grievance may be justified, it is not

remediated under the Equal Pay Act, which guarantees a remedy for disparate wages based upon unlawful gender discrimination.[2]

III.

We will affirm the district court's judgment because Hess failed to offer evidence upon which a jury could find in his favor to counter the defendant's affirmative defense under the Equal Pay Act.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
CAROL LOS MANSMANN,
Circuit Judge

---

[2]Since we find that Hess has not met his ultimate burden of proof, we need not address the allegation by the State System of Higher Education that Hess has not proven job equality between his Police Officer II position and Bogart's new Police Officer II position, as it pertains to required skill, effort and associated responsibilities beyond the mere advertence to job titles, as an element of the ordinary prima facie case.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. HESS	:	
	:	Civ. No.
v.	:	90-4128
	:	
PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION	:	

ORDER

Upon consideration of defendant's motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, for the reasons given from the bench on March 17, 1992, it is hereby ORDERED and DIRECTED that defendant's motion is GRANTED, and judgment is entered in favor of defendant.

MARCH 18, 1992

/s/ Louis H. Pollak
LOUIS H. POLLAK, Judge

ENTERED March 19, 1992
CLERK OF COURTS

§ 623. Prohibition of age discrimination

It shall be unlawful for an employer--

"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(3) to reduce the wage rate of any employee in order to comply with this chapter."